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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

ETHAN RAE AIZIKOVITZ,

Defendant and Appellant.

A154870

(Sonoma County  
Super. Ct. No. SCR-705914-1)

Defendant Ethan Rae Aizikovitz<sup>1</sup> crashed his vehicle into the rear of a motorcycle while driving drunk, killing the motorcyclist. Defendant pled guilty to gross vehicular manslaughter while intoxicated. The court sentenced him to the lower term of four years in state prison. On appeal, defendant contends the trial court abused its discretion by imposing a four-year prison term because it relied on improper criteria. We affirm the judgment.

**I. BACKGROUND**

Defendant was charged in a felony complaint, filed on March 18, 2107, with gross vehicular manslaughter while intoxicated (Pen. Code, § 191.5, subd. (a); count 1), driving under the influence of an alcoholic beverage causing injury (Veh. Code, § 23153, subd. (a); count 2), and driving with a 0.08 percent blood alcohol content causing injury (Veh. Code, § 23153, subd. (b); count 3). The complaint also alleged a serious felony

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<sup>1</sup> We note the abstract of judgment spells defendant's last name "Aizkovitz," but the trial court record, which includes signed statements by defendant and his father, spells his last name "Aizikovitz."

enhancement as to the first count, and great bodily injury and excess blood alcohol enhancements as to the second and third counts.

The charges against defendant arose from a collision between defendant's vehicle and a motorcycle driven by the victim. According to a witness driving in the opposite direction, the motorcycle was slowing for a stop sign and defendant's vehicle was travelling approximately one car length behind at about 45 miles per hour. The witness heard a crash and looked in her rear-view mirror. She saw the motorcycle moving out of control toward the side of the road. She then heard a second crash, and saw defendant's vehicle with its brake lights on but still moving forward.

An officer interviewed defendant at the scene. During that interview, defendant stated he stopped at a stop sign and “ ‘realize[d] there was someone on the side of the road.’ ” When asked whether he drove through the stop sign and felt a bump, the defendant stated, “ ‘Well I—to be honest I didn't even feel a bump.’ ” Defendant initially denied involvement, stating, “ ‘[W]e didn't hit anything like a motorcycle . . . we didn't hit anything’ ” and “ ‘To be honest I don't think that I did this situation.’ ”

Defendant expressed surprise by the damage to his vehicle, which included a torn right front bumper with damage to the light assembly, a peeled back right front fender with damaged components behind it, buckling and scrapes on the right front hood edge, a cracked right rear light lens, a broken windshield, and various scrapes and cracks along the left front bumper, side, and rear corner. Damage to the motorcycle included the following: the rear tail area and light assembly were crushed forward and to the side, the rear wheel was out of alignment, the drive chain was off the rear sprocket, the left side foot pegs were broken, the seat was knocked off, the front fuel tank mounts were pulled loose, both brake levers were bent, the engine case had a hole in the side, the right handle bar was bent, both mirrors were folded backwards, and the entire right side and muffler had significant scrapes. A large piece of defendant's vehicle bumper and a piece of metal from the vehicle were located above the motorcycle's rear wheel.

Defendant's girlfriend, who was in the vehicle with him, stated she was either relaxing or asleep at the time of the incident, and did not recall the vehicle striking anything. She stated the airbags deployed and defendant " 'started freaking out.' "

Defendant performed poorly on multiple field sobriety tests, and preliminary alcohol screen tests indicated blood alcohol contents of 0.177 percent and 0.173 percent. A records check indicated defendant's driver's license was expired.

Following his arrest, defendant claimed the motorcycle was approaching from the opposite direction and " 'the bike started to swerve into my lane and I had an uncomfortable feeling of where I should go okay so I started to make a move and that's where the, uh, I dunno, I guess the awkward collision happened. I would say [it] was from the bike kinda swerving and, umm, making a, umm, making like a direction into my lane, so I had to make a decision as to what I was gunna do.' " Defendant stated, " 'It's very hard for me to be caught up in some situation like this, umm, because I do drink and I do like to drink that's part of my industry it's not that you know I am not trying to shy away from that or anything you know. . . . So I just feel like this was a very unfortunate situation for me to get caught up in. And I . . . hope we can all just take some, you know, take a, you know, deep look into this and understand . . . I just hope that I'm not getting the lashings on this, you know, and getting thrown in the corner on this one because I had a few drinks, I think that's very unfair.' "

Defendant admitted to having two glasses of wine and one beer during the course of the evening. He denied drinking at his residence, but his girlfriend stated they each had a glass of wine at his residence.

Approximately a year after the incident, defendant pled guilty to count 1 and the related serious felony enhancement. This plea provided for a sentence to be decided by the court, up to a maximum of six years in prison. The remaining counts and enhancements were dismissed.

The probation department submitted a presentencing report to the court. The report identified two factors weighing against probation: defendant's blood alcohol content, which was approximately twice the legal limit, and the "irreversible emotional

injury” to the victim’s family. The report also acknowledged “the lack of clear information regarding the defendant’s activities, the timing and quantity of his alcohol consumption leading up to the underlying offense, and his depicted nonchalance at the time of arrest, is intensely troubling.” However, the report identified various factors in support of probation, including defendant’s lack of a criminal record or significant history of substance abuse, his willingness to comply with the terms of probation and seek treatment, a supportive family, a history of stable employment, and the negative impact of imprisonment on defendant. The report included numerous letters the probation department had received in support of defendant discussing his remorse and attesting to his positive character. At the time of the report, the probation department had not been contacted by the victim’s family. The report ultimately recommended four years of probation with a one-year county jail sentence.

The district attorney filed a statement arguing the court should sentence defendant to state prison. It asserted any mitigating factors were outweighed by the severity of defendant’s conduct, the everlasting impact on the victim’s family, and defendant’s attempt to distance himself from the crime and blame the victim for the accident.

Defendant also submitted a sentencing memorandum, which supported the probation department’s recommendation of probation. He argued probation was appropriate given his demonstration of remorse, his willingness to comply with probation, the likely negative effect prison would have upon him, his lack of criminal history, and his youth.

The probation department filed a supplemental memorandum after it received letters from the victim’s family. These letters discussed the importance of the victim to their family and the ongoing impact the victim’s death has had on the family. Based on these letters, the probation department altered its recommendation from probation to a low term of four years in prison. It explained, “As noted in our original evaluation, had the victim’s family communicated a desire for the defendant to be sentenced to prison, that request would have likely altered our recommendation. As such a request is now forthcoming, we have changed our recommendation.” The supplemental memorandum

acknowledged the factors in support of probation but emphasized, “[W]e believe sentencing should focus on making the victim’s family whole.”

In response, defendant filed a supplemental sentencing memorandum contesting the new recommendation. Defendant argued the court should not only consider the wishes of the victim’s family but objectively balance all the relevant factors including those in favor of probation. Defendant again emphasized the factors in favor of probation and asserted a prison term would not further the general objectives of sentencing.

At the sentencing hearing, various members of the victim’s family spoke and read statements regarding the importance of the victim to their lives, the anguish they now feel, and the importance of a prison term for their healing. Defendant also made a statement to the court emphasizing his remorse. The court acknowledged the mitigating factors, but denied probation. In so ruling, the court stated: “[Defendant] is remorseful at this point. However, his conduct at the time of the collision, it was completely unacceptable. I’m not sure what—He was under the influence, although he stated he was not at the time. However, there are certain things that can’t be left out, and that’s the fact that a life was taken. Someone’s no longer with us. They were not injured. They did not go to the hospital. They did not have broken bones, and that cannot be ignored.”

Following the hearing, the court imposed a four-year prison term, plus fines and restitution. Defendant timely appealed.

## **II. DISCUSSION**

Defendant contends the trial court erred in denying his request for probation based on the victim’s death and his conduct at the scene of the crime. He argues the factors affecting whether to grant probation “so strongly supported a grant of probation that the court’s decision to impose a prison sentence instead constituted an abuse of discretion.” We disagree.

### ***A. Standard of Review***

We review a trial court’s decision to grant or deny probation under the deferential abuse of discretion standard. (*People v. Ferguson* (2011) 194 Cal.App.4th 1070, 1091.) “A sentencing court enjoys broad discretion in determining whether to grant or deny

probation.” (*People v. Mehserle* (2012) 206 Cal.App.4th 1125, 1157 (*Mehserle*).) “ ‘The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.’ ” (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977–978.)

The criteria affecting a trial court’s decision to grant or deny probation are set forth in California Rules of Court, rule 4.414 (rule 4.414).<sup>2</sup> These criteria “must be considered by the sentencing judge, and will be deemed to have been considered unless the record affirmatively reflects otherwise.” (Cal. Rules of Court, rule 4.409.) A trial court’s denial of probation after consideration of these criteria on the merits is almost

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<sup>2</sup> Rule 4.414 provides: “Criteria affecting the decision to grant or deny probation include facts relating to the crime and facts relating to the defendant.

“ (a) Facts relating to the crime . . . include: [¶] (1) The nature, seriousness, and circumstances of the crime as compared to other instances of the same crime; [¶] (2) Whether the defendant was armed with or used a weapon; [¶] (3) The vulnerability of the victim; [¶] (4) Whether the defendant inflicted physical or emotional injury; [¶] (5) The degree of monetary loss to the victim; [¶] (6) Whether the defendant was an active or a passive participant; [¶] (7) Whether the crime was committed because of an unusual circumstance, such as great provocation, which is unlikely to recur; [¶] (8) Whether the manner in which the crime was carried out demonstrated criminal sophistication or professionalism on the part of the defendant; and [¶] (9) Whether the defendant took advantage of a position of trust or confidence to commit the crime. [¶] . . .

“(b) Facts relating to the defendant . . . include: [¶] (1) Prior record of criminal conduct, whether as an adult or a juvenile, including the recency and frequency of prior crimes; and whether the prior record indicates a pattern of regular or increasingly serious criminal conduct; [¶] (2) Prior performance and present status on probation, mandatory supervision, postrelease community supervision, or parole; [¶] (3) Willingness to comply with the terms of probation; [¶] (4) Ability to comply with reasonable terms of probation as indicated by the defendant’s age, education, health, mental faculties, history of alcohol or other substance abuse, family background and ties, employment and military service history, and other relevant factors; [¶] (5) The likely effect of imprisonment on the defendant and his or her dependents; [¶] (6) The adverse collateral consequences on the defendant’s life resulting from the felony conviction; [¶] (7) Whether the defendant is remorseful; and [¶] (8) The likelihood that if not imprisoned the defendant will be a danger to others.”

invariably upheld. (*Mehserle, supra*, 206 Cal.App.4th at p. 1157; 3 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Punishment, § 638, p. 1037.) A single aggravating factor is sufficient to support denial of probation. (*People v. Robinson* (1992) 11 Cal.App.4th 609, 615, disapproved on another ground in *People v. Scott* (1994) 9 Cal.4th 331, 353, fn. 16; *People v. Castellano* (1983) 140 Cal.App.3d 608, 615.)

## **B. Denial of Probation**

### **1. Trial Court's Reference to the Victim's Death**

Defendant first argues his denial of probation cannot be based on the victim's death because that factor is inseparable from the crime itself. He relies on *People v. Golliver* (1990) 219 Cal.App.3d 1612 (*Golliver*) and *People v. McNiece* (1986) 181 Cal.App.3d 1048 (*McNiece*) to support his position. Undoubtedly, *McNiece* and *Golliver* indicate a court may not rely on the fact of death *alone* as an aggravating factor in imposing a term for vehicular manslaughter.<sup>3</sup> But in this instance, the court did not merely rely on the victim's death. The entire sentencing record suggests the court's statement that "certain things . . . can't be left out, and that's the fact that a life was taken" relates to the emotional harm suffered by the victim's family as a result of the victim's death. The victim's family described their severe suffering and emotional distress in both written statements and oral statements to the court. The impact on a victim's family, including the emotional harm inflicted, is a valid factor in deciding whether to deny probation. (*Mehserle, supra*, 206 Cal.App.4th at p. 1158; see Cal. Rules

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<sup>3</sup> We note while the *Golliver* court stated it had "no quarrel" with the general reasoning in *McNiece*, it distinguished that case because "there are no facts in [*McNiece*] upon which [rule 4.414] criteria could be found to be applicable other than facts which are inseparable from the commission of the crime itself." (*Golliver, supra*, 219 Cal.App.3d at p. 1619.) In *Golliver*, however, the court concluded, "the record *does* disclose facts surrounding the commission of the manslaughter which support the trial court's 'nature and seriousness' reason but which do not constitute inherent elements of the crime of manslaughter." (*Id.* at pp. 1619–1620.) These facts included a physical fight between the defendant and the victim and the defendant's decision to abandon the victim in an isolated location in the middle of the night. (*Id.* at p. 1620.)

of Court, rule 4.414(a)(4) [facts relating to the crime include “Whether the defendant inflicted physical or emotional injury”].)

In *Mehserle*, a Bay Area Rapid Transit District (BART) police officer shot and killed a passenger during an arrest and was convicted of involuntary manslaughter. (*Mehserle*, *supra*, 206 Cal.App.4th at p. 1129.) At sentencing, the victim’s relatives addressed the court and detailed the immense suffering felt by the family and community. (*Id.* at pp. 1156–1157.) The trial court found the defendant credible when he testified he did not intend to shoot the victim, and it noted various mitigating factors such as no prior criminal record, no history of aggression, a good work history, a loving and supportive family, no likelihood of re-offending, and “ ‘tons’ ” of remorse. (*Id.* at p. 1157.) However, the trial court denied probation and sentenced him to a prison term, commenting, “ ‘[W]hen I consider sentencing as the probation department has observed, I must remember that a young man needlessly died. I believe prison is appropriate.’ ” (*Ibid.*) On appeal, the defendant argued the trial court improperly relied on the victim’s death as a reason to deny probation. (*Id.* at p. 1156.) The Court of Appeal rejected the defendant’s argument and affirmed the sentence. It explained: “The ‘needlessly died’ reference should not be taken out of context. The court considered competing sentencing memoranda and a probation report recommending against probation, in large part based on the emotional impact to [the victim’s] family. Of more significance is the court’s consideration of the statements to the court by [the victim’s] relatives, who described the impact of the killing on them, on their attitudes toward police officers, and on the emotional life and financial status of [the victim’s] fatherless young daughter. A sentencing court may consider the emotional and financial impact of the offense on the victim’s family in deciding whether to deny probation.” (*Id.* at p. 1158.)

Here, the court’s reference to the victim’s death, read in the context of the various letters and statements made by the victim’s family, can reasonably be interpreted as addressing the emotional impact on the victim’s family. Both rule 4.414 and *Mehserle* allow courts to consider this factor. Accordingly, the trial court did not improperly rely



on the victim's death but rather considered a valid factor when assessing whether to deny probation.

## **2. Conduct at Scene of Incident**

Defendant next argues his denial of probation cannot be based on his conduct at the scene of the incident because such conduct was not more egregious than other instances of gross vehicular manslaughter and was intertwined with an essential element of the offense, namely, his intoxication.

First, defendant asserts his "poor behavior" was less serious than other instances of gross vehicular manslaughter, such as those cases in which the driver attempted to flee the scene, blamed a passenger, or had prior DUI's.<sup>4</sup> However, the record certainly contains evidence that defendant's crime was more serious than "other instances of the same crime." (Cal. Rules of Court, rule 4.414(a)(1).) For example, defendant's blood alcohol content—recorded at 0.177 and 0.173 percent—was over double the legal limit of 0.08 percent, defendant was driving on an expired license, and defendant initially denied hitting the motorcycle and then attempted to blame the victim for causing the accident. The fact that other cases may involve more egregious conduct, such as fleeing the scene, does not mean defendant's conduct was not also serious. Defendant does not cite any authority, and we are not aware of any, requiring a court to grant probation for a gross vehicular manslaughter conviction where the defendant did not flee, blame a passenger, or have prior DUI's. To the contrary, probation has been denied in gross vehicular manslaughter cases without such facts. (See, e.g., *People v. Ferguson* (2011) 194 Cal.App.4th 1070, 1092–1093 [no evidence defendant had prior DUI's or sought to avoid responsibility; court affirmed denial of probation]; *People v. Givan* (2015) 233 Cal.App.4th 335, 339 [defendant denied probation and sentenced to prison despite no evidence he sought to avoid responsibility].)

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<sup>4</sup> California Rules of Court, rule 4.414(a)(1) provides the court may consider "The nature, seriousness, and circumstances of the crime as compared to other instances of the same crime."

Second, defendant contends the court cannot rely on his callous conduct at the scene of the incident to deny probation because it is intertwined with his intoxication, which is an element of the offense. Defendant cites no authority to support this argument. Nor are we aware of any. Moreover, defendant has not offered any evidence his behavior was, in fact, caused by intoxication. The letters in support of defendant discuss his general compassionate nature, but shed no light on how defendant acts when intoxicated or in situations of significant stress or shock. Accordingly, we cannot conclude from the record that defendant's conduct was caused by his intoxication.

### **3. Other Factors Affecting Probation Decision**

Finally, defendant argues the criteria set forth in rule 4.414 "so strongly" support granting probation that the trial court's failure to do so constituted an abuse of discretion. Defendant's argument requires this court to reweigh the evidence and reach an alternative conclusion. We decline to do so. (*People v. Weaver* (2007) 149 Cal.App.4th 1301, 1311 [" 'In reviewing [a trial court's determination whether to grant or deny probation,] it is not' " the appellate court's function to substitute its judgment for that of the trial court; its function " 'is to determine whether the trial court's order . . . is arbitrary or capricious or exceeds the bounds of reason considering all the facts and circumstances' "]; *People v. Jordan* (1986) 42 Cal.3d 308, 317 ["The Court of Appeal . . . erred when it reweighed the circumstances in mitigation rather than limiting its review to whether the sentencing court abused its statutory discretion."].) Furthermore, the trial court need not rely on all factors when determining whether to grant probation. A single aggravating factor is sufficient to support denial of probation and, in this instance, the trial court identified more than one such factor. (See *People v. Robinson, supra*, 11 Cal.App.4th at p. 615.)

Although there were certainly factors favorable to defendant that the court could have used to support a decision granting probation, there were other factors that supported its determination to deny probation. We cannot say the trial court's assessment of these factors and its decision to deny probation was "irrational or arbitrary." (See *People v. Superior Court (Alvarez), supra*, 14 Cal.4th at p. 977.)

### **III. DISPOSITION**

The judgment is affirmed.

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Margulies, J.

We concur:

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Humes, P. J.

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Banke, J.

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*People v. Aizikovitz*